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No. 76-678

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

SHELL OIL COMPANY,
Petitioner

v.

ANNE M. DARTT,
Respondent

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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INDEX

Page

Opinions Below 2

_____F. Supp._____10 FEP Cases 844 (N.D. Okla. 1975) 2

Jurisdiction 3

28 U.S.C. § 1254(1) 3

Questions Presented 3

Statutes Involved 3

Employment Act (29 U.S.C. § 626) 3

Statement of the Case 3

Discrimination in Employment Act of 1967, 7(b), 16(b) 4

Statement of Facts 5

REASONS FOR DENYING THE WRIT: A. The Decison of the Tenth Circuit Court presents no clear conflict with the other Circuits 12

Culpepper v. Reynolds Metal Co., 421 F.2d 888 (5th Cir. 1970) 15, 16

Eklund v. Lubrizol Corp., 529 F.2d 247 (6th Cir. 1976) 18

Goger v. H. K. Porter Company, Inc., 492 F.2d 13 (3rd Cir. 1974) 19

Hiscott v. General Electric Co., 521 F.2d 632, (6th Cir. 1975) 17, 18

INDEX (Cont.)

Hodgson v. First Federal Savings & Loan Association of Broward County, Florida, 455 F.2d 818 (5th Cir. 1972) 14

Love v. Pullman, 404 U.S. 522, 527 92 S.Ct. 616, 619, 30 L.Ed. 2d 679 (1972) 16, 20

Moses v. Falstaff Brewing Corp., 525 F.2d 92 (8th Cir. 1975) 18

Ott v. Midland-Ross Corp., 523 F.2d 1364 (6th Cir. 1975) 17

Powell v. Southwestern Bell Telephone Co., 494 F.2d 485 (5th Cir. 1974) 13

Reeb v. Economic Opportunity Atlanta, Inc., 516 F.2d 924 (5th Cir. 1975) 15, 16

Rucker v. Great Scott Supermarkets, 528 F.2d 393 (6th Cir. 1976) 21

Skoglund v. Singer Co., (U. S. D. C., N.H. 1975) ..20, 21

Title VII Civil Rights Act of 1964, 42 U.S.C. § 2000e 13, 14

29 U.S.C. § 626 ..... 17, 21

Conclusion 23

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Petitioner has petitioned this Court to review the final judgment of the Tenth Circuit Court of Appeals in the above-styled cause which was entered on August 19, 1976 which

decision reversed a United States District Court decision from the Northern District of Oklahoma. The basis of the District Court's decision was the failure of the respondent to file a Notice of Intent to Sue in accordance with Section 626 (d)(1) of the Age Discrimination Employment Act (29 U.S.C. § 626 (d)(1). The Tenth Circuit reversed the District Court's decision while holding that the Notice of Intent to Sue must be filed before a private action can be maintained but holding that the 180-day time limitation within which the Notice to Sue is required to be filed is subject to equitable tolling and further holding that the respondent's activities in attempting to pursue her remedy through the Labor Department entitled her to equitable relief in the case at bar.

OPINIONS BELOW

The decision of the United States District Court for the Northern District of Oklahoma is reported at_____F. Supp._____10 FEP Cases 844 (N.D. Okla. 1975) (Petitioner's Appendix A, pp. 1a-15a). The opinion of the United States Court of Appeals for the Tenth Circuit is reported at _____F.2d_____, 13 FEP Cases 12 (10th Cir. 1976) (Petitioner's Appendix B, pp. 16a-26a). The Order denying the Petition for Rehearing was not reported. (Petitioner's Appendix C, p. 27a).

JURISDICTION

The Tenth Circuit Court of Appeals decision was filed on July 22, 1976, and, thereafter, a Petition for Rehearing was filed on August 3, 1976, and denied on August 19, 1976.

28 U.S.C. § 1254(1) is the basis for the jurisdiction of this Court.

QUESTIONS PRESENTED

1) Whether the requirement under 29 U.S.C. § 626(d) that the Notice of Intent to Sue be given within 180 days is jurisdictional so as to bar equitable relief to a claimant under proper circumstances.

STATUTES INVOLVED

As the petitioner has stated in its Brief, this case involves the interpretation and application of Section 626 of the Age Discrimination in Employment Act (29 U.S.C. § 626). The text of that statute has been set forth by petitioner's (Appendix D at pp. 29a) and is therefore not repeated here.

STATEMENT OF THE CASE

Respondent filed an action in the United States District Court for the Northern District of Oklahoma against her former employer, the Shell Oil Company, under Section

7(b) of the Age Discrimination in Employment Act of 1967 (hereinafter, the Act or ADEA,[1] and Section 16(b) of the Fair Labor Standards Act of 1938.[2] Plaintiff charged defendant with certain unlawful employment practices based on age, including specifically the act of discharging her in violation of the ADEA. Accordingly, plaintiff sought an injunction in the District Court which would require the defendants to reinstate her, as well as damages which she had suffered by reason of her unlawful discharge together with costs and attorneys' fees.

The United States District Court for the Northern District of Oklahoma held that it lacked subject matter jurisdiction, because plaintiff had not strictly complied with the procedural timetable set out in Section 7(d)(1) of the ADEA with respect to filing a "Notice of Intent to Sue" with the Secretary of Labor "within one hundred and eighty days after the alleged unlawful practice occurred," and dismissed plaintiff's action. In so doing, the District Court also ruled that plaintiff's prompt complaint to the United States Department of Labor, made within nine days of her discharge, even when considered in conjunction with her subsequent

[1] Act of December 6, 1967, Public Law 90-202, 81 Stat. 602, as amended; 29 U.S.C. § 621 *et seq.* The pertinent statutory provisions are set forth, *infra*, pp. 3-6.

[2] Act of June 25, 1938, c. 676, 52 Stat. 1060, as amended; 29 U.S.C. § 201 *et seq.* Section 7(b) of the ADEA [29 U.S.C. § 626(b)] incorporates by reference the civil enforcement provisions of the Fair Labor Standards Act, including Section 16(b) of that act [29 U.S.C. 216(b)].

formal notification, neither satisfied nor tolled the ADEA notice requirement or equitable grounds.

On appeal to the Tenth Circuit Court of Appeals, the Tenth Circuit held that while the Notice of Intent to Sue was required, the one hundred and eighty day limitation period within which the Notice of Intent to Sue was required to be filed was subject to equitable tolling and held that plaintiff's actions entitled her to equitable relief.

STATEMENT OF FACTS

Mrs. Anne M. Dartt was employed by the Shell Oil Company, at its Credit Card Center in Tulsa, Oklahoma, from January 3, 1966 until July 31, 1973 (Cmplt. ¶III and IX, R. 4, 6; Opin., R. 16). At the time of her discharge (Tr. 25, 38), she was 51 years of age and employed as a Senior Credit Analyst (Cmplt. ¶IX, R. 6; Opin., R. 16).

On August 9, 1973,[3] nine days after her termination, Mrs. Dartt visited the Tulsa, Oklahoma office of the Wage and Hour Division, U. S. Department of Labor, and spoke with its Assistant Area Director, Mr. J. Dean Speer (Opin., R. 16; Tr. 33, 45, 88). Mrs. Dartt complained that she had been fired by Shell due to her age (Opin., R. 16-17; Tr.

[3] The court below, based on the mistaken testimony of Mrs. Dartt (Tr. 26, 45, 49-50), used the date September 9, 1973 (Opin., R. 16). The correct date is August 9th (Tr. 90; see also, Tr. 57) as the court apparently recognized during the course of the evidentiary hearings (Tr. 81, 101).

44-45). As she explained to the court below, her belief that she had been unlawfully discharged was based on a statement made to her by her supervisor that she had "no potential because of (her) age" (Tr. 44).

When Mrs. Dartt was at the Wage-Hour office in Tulsa, Mr. Speer "question(ed) her about the facts of the case, * * * made notes (and) fill(ed) out (a Labor Department) internal form indicating the substance of her complaint" (Tr. 116).[4] In addition, he told her that "on the face of it, it appears that you do have a right to complain and I'll investigate and I will let you know" (Tr. 33-34). First, however, because of what Mr. Speer considered to be a good working relationship with the Shell Oil Company (Tr. 110-112, 116-119), he immediately undertook to conciliate the matter (Tr. 92-93). Indeed, as he testified, he called Shell "that very afternoon" (Tr. 112; see also Tr. 33) and informed one of its representatives — a Mr. Frank Thompson — of the receipt of Mrs. Dartt's age discrimination complaint (Tr. 57). The next day, August 10th, this information was relayed by Mr. Thompson to Mr. Kenneth E. Jacobs (Tr. 57), Shell's Manager for Employee Relations (Tr. 53), whose

[4] As Mr. Speer testified, when Mrs. Dartt came in to lodge her age discrimination complaint, a standard compliance file was opened to cover the matter (Tr. 113). Pursuant to subpoena (see R. 2), Mr. Speer brought that file with him to court and used it to "refresh (his) memory" prior to giving testimony (Tr. 113, 119).

equal employment duties with Shell also involve the ADEA (Tr. 54).

"(A)pproximately one week later," Mr. Speer again called Shell, this time speaking with Mr. Jacobs for the purpose of arranging a conference (Tr. 58; also, Tr. 126). The conference was held the following day at Shell's Credit Card Center (Tr. 112; also, Tr. 101). In his discussions with Mr. Speer, Mr. Jacobs learned that Mrs. Dartt had not filed a notice of intent to sue (Tr. 57-58, 127).

On September 4, 1973, Mr. Jacobs addressed a letter to Mr. Speer, enclosing some materials he had requested relating to the employment of Mrs. Dartt and all other employees classified as Senior Credit Analysts as of the date of her discharge (Affidavit of Warren D. Landis (hereinafter, Landis Aff't), *supra*, p. 8n.4, at ¶7). Mr. Speer continued his conciliation effort by meeting with Mr. Jacobs on October 31, 1973 (Landis Aff't at ¶8), but, as he testified, he "was unsuccessful" (Tr. 93, 96). He then assumed an "investigative posture" (Tr. 91). In November 1973, Mr. Speer obtained a promise from Shell that it would "make some internal studies (and) develop some statistical information" as he had requested, but this promise was never kept (Tr. 93-94). See Landis Aff't at ¶9.

As the court below found, Mrs. Dartt called Mr. Speer several times to inquire about the status of the matter (Opin.,

R. 17; Tr. 28, 34-35, 46-47). Each time she was informed that she would be notified as soon as any action was taken (Opin., R. 17; Tr. 34). Unfortunately, however, she was not advised of her private right to bring a civil action under the ADEA or of the 180-day notice requirement during any of her several contacts with Mr. Speer (Tr. 27, 35, 47, 50). One such call was made on January 21, 1974 (*i.e.*, 174 days after her discharge); her last call was made on March 1, 1974 (Landis Aff't at ¶11). Thereafter, on March 5, 1974, Mr. Speer informed Mrs. Dartt by letter that "there will be a delay *in completing* this investigation" and notified her of the private right to sue under the Act (Pltf's Exh. 2, R. 36, emphasis added; see Landis Aff't at ¶12 and Opin., R. 17). Enclosed with the letter was an explanatory pamphlet entitled "Age Discrimination in Employment Act" (Landis Aff't at ¶12; see Opin., R. 17 and Plft's Exh. 2, R. 36), which states in pertinent part:

> Before an individual brings court action, he must give the Secretary not less than 60 days' notice of his intention. This notice must be filed within 180 days of the occurrence of the alleged unlawful practice * * *. The law provides that after receiving such a notice, the Secretary will notify the prospective defendants and try to eliminate any alleged unlawful practice by informal conciliation, conference, and persuasion. [Wage-Hour Publication No. 1230 at p. 4 (1971); quoted in Tr. 69.]

At trial, Mrs. Dartt stated that this constituted her first actual knowledge of her right to maintain a private ADEA

action and of the Act's 180-day notice requirement (Tr. 34, 47; Opin., R. 17). Promptly, therefore, upon receipt of the letter and pamphlet, she contacted and retained private counsel (Opin., R. 17; Tr. 35, 37; see also, Tr. 21). On March 14, 1974 (*i.e.*, 216 days after discharge), her attorney mailed a letter to the Labor Department's office in Tulsa, Oklahoma, for the attention of Mr. Speer, giving notice that Mrs. Dartt intended to commence a civil action under the ADEA against the Shell Oil Company (Exh. A to Cmplt, R. 9).

Based on this formal notification (Tr. 120), and in accordance with internal Labor Department procedures (see Tr. 121-122), Mr. Speer "attempted to reconciliate or get back into the conciliation procedure under our responsibilities when we receive Notice of Intent to Sue" (Tr. 93). Thus, on March 15, 1974, Mr. Speer sent out two letters: one to Mrs. Dartt's attorney, acknowledging receipt of the notice of intent to sue; and the other to Shell's Manager for Employee Relations, informing him of the receipt of Mrs. Dartt's notice of intent to sue (Landis Aff't at ¶14 and 15). Each letter also outlined the Labor Department's procedures for attempting to conciliate and settle the matter *(ibid.)*. Thereafter, following conversations with Mrs. Dartt regarding terms of settlement agreeable to her, Mr. Speer met with Shell's Manager for Employee Relations to discuss the possibility of mediating or settling Mrs. Dartt's age discrimination complaint (Landis Aff't at ¶16). Again, on May 14, 1974, Mr.

Speer talked with Shell's Employee Relations Manager as to the possibility of settling the matter (Landis Aff't at ¶17). This second conciliation effort also "proved unsuccessful" (Tr. 93). Therefore, by letter dated May 16, 1974, Mr. Speer notified Mrs. Dartt's attorney that attempts to conciliate her complaint had been unsuccessful and that she was free to take whatever action she thought advisable (Landis Aff't at ¶18).

This ADEA action was filed by Mrs. Dartt's attorney on May 21, 1974 (Cmplt., R. 4); that is, more than 60 days after giving formal notice of an intent to sue the Shell Oil Company. The complaint sought an injunction requiring defendant Shell to reinstate plaintiff Dartt in its employ, and the recovery of sums due plaintiff by reason of her unlawful discharge, together with costs and attorney fees (Cmplt., R. 8). On June 11, 1974, defendant filed a motion to dismiss for failure to state a cause of action (R. 12-14).

In order to develop the facts necessary to resolve the questions raised by defendant's motion to dismiss, the district court held two evidentiary hearings (see Opin., R. 16). The principal witnesses were plaintiff Dartt (Tr. 24-52), defendant's Manager for Employee Relations, Mr. Jacobs (Tr. 53-62), and Mr. Speer from the Labor Department (Tr. 87-129). The latter's testimony was generally limited to questions concerning the timing of Mrs. Dartt's discrimination complaint and her notice of intent to sue. On February 6, 1975, the District court granted defendant's motion to dismiss (R. 15).

In dismissing the action, the District court ruled that it lacked subject matter jurisdiction because the plaintiff had not strictly complied with the procedural timetable set out in Section 7(d)(1) of the ADEA for notifying the Secretary of Labor of an intent to sue "within one hundred and eighty days after the alleged unlawful practice occurred." It also held that timely filing of the required notice was a jurisdictional prerequisite to the maintenance of a private ADEA action (Opin., R. 18-20). (Petitioner's Brief — Exb. A pp. 1a-15a)

The court further ruled that plaintiff's age discrimination complaint — although made to the local Labor Department Wage-Hour office shortly after her discharge — technically did not satisfy the ADEA Section 7(d)(1) requirement that a "notice of intent to sue" be filed with the Secretary of Labor. Describing the pertinent statutory language as clear and unambiguous, the court held that it was without authority to accept a mere complaint in satisfaction of the formal notice mandated by the Act (Opin., R. 20-23).

Finally, the lower court declined to view Mrs. Dartt's formal notification as relating back to the original filing of

her complaint. Instead, it construed Section 7(d)(1) so strictly as to defeat any and all of the equitable grounds offered by plaintiff for tolling the 180-day notice requirement. Thus, despite the fact that the defendant — well within the 180-day period — had received actual notice and an opportunity to conciliate the asserted violation, the court ruled that the purposes of the Act had somehow not been satisfied (Opin., R. 23-28).

Respondent's Complaint was dismissed by the District Court on February 6, 1975, and respondent thereafter perfected her appeal to the Tenth Circuit Court of Appeals, and on July 22, 1976, that Court entered an order reversing the judgment of the District Court and holding that plaintiff's actions in attempting to promptly pursue her remedy under the ADEA had resulted in the *de facto* fulfillment of the main purposes of the Act and held the time limitation (180 days) was tolled until the filing of respondent's Notice of Intent to Sue.

REASONS FOR DENYING THE WRIT

A. The Decision of the Tenth Circuit Court presents no clear conflict with the other Circuits

The purported differences in the holdings of the several Circuit Courts which have interpreted the 60 day notice requirement of intent to sue under the ADEA are more imag-

ined than real. A close examination of them will reveal they do, in fact, recognize the very principle on which the Tenth Circuit of Appeals decided the case. Thus, the ultimate inquiry in each instance is: Do the facts of the case warrant equitable relief?

In considering this question, it is proper to look to those decisions decided under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e. As the Courts have uniformly recognized, the ADEA was in substantial part patterned after Title VII of the Civil Rights Act of 1964.[5] For instance, the ADEA's 180 day notice provision is very similar to the provision in Title VII which requires that "a charge . . . be filed (with the Equal Employment Opportunity Commission) within 180 days after the alleged unlawful employment practice occurred."[6]

Petitioner cited the case of *Powell v. Southwestern Bell Telephone Co.*, 494 F.2d 485 (5th Cir. 1974) for the proposition that the 60-day Notice of Intent to Sue requirement is jurisdictional. In this *Powell* case, as in others cited by petitioner, it is true that the Court has loosely used the word "jurisdictional" in speaking of this requirement. The case did hold that filing the Notice of Intent to Sue is a pre-

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[5] *Laugesen v. Anaconda Co.*, 510 F.2d 307, 311 (6th Cir. 1975); *Goger v. H. K. Porter Co., Inc.*, 492 F.2d 13, 15 (3rd Cir. 1974); *Hodgson v. First Federal Savings & Loan Association of Broward County, Florida*, 455 F.2d 818, 820 (5th Cir. 1972).

[6] 42 U.S.C. § 2000e-5(e).

requisite to the right to file any suit whatsoever under the ADEA. This is in line with the holding of the Tenth Circuit and the other decisions as well. It does not follow, however, that the 180-day limitation within which the Notice of Intent to Sue must be filed is also jurisdictional. In the *Powell* case, the claimant was specifically advised to note the specific time limits governing the circumstances under which she could file her own suit. This was some eleven (11) days after the alleged discrimination occurred. She was again informed of her rights on June 12, 1970, which was some four months after the act of discrimination. The existence of specific time limitations in connection with private lawsuits was at that time reiterated to her, together with the fact that nothing done by her to that point was considered to be notice of her intent to file suit. The Fifth Circuit merely held that under those circumstances, since she was expressly alerted to the time limitation for possible action, both private and agency assisted, the time limitation would not be tolled. In other words, they resolved a fact question against the claimant holding that the circumstances did not entitle her to equitable relief.

The Fifth Circuit Court of Appeals having recognized in *Hodgson v. First Federal Savings & Loan Association of Broward County, Florida*, 455 F.2d 818 (5th Cir. 1972), the similarity between the ADEA and Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, has shed light on this

question in the late case of *Reeb v. Economic Opportunity Atlanta, Inc.*, 516 F.2d 924 (5th Cir. 1975). In that case, the Court was concerned with the 90-day period (now 180 days) for filing a charge of employment discrimination with the Equal Employment Opportunity Commission, and they there held that this statute did not begin to run until facts that would support a charge of discrimination were apparent or should have been apparent to a person with reasonably good regard for his rights, similarly situated to the plaintiff. In that case, an employee was fired and a spurious reason for her dismissal was given. It was not until some time later that she discovered the true reason for her dismissal, during which time the 90-day period had run.

The Court in *Reeb*, commented on the conceptual confusion that had arisen from the use of the word "jurisdictional" by the Courts while proceeding to apply equitable considerations to the statutes of limitations. The Court cited *Culpepper v. Reynolds Metal Co.*, 421 F.2d 888 (5th Cir. 1970) where it was held that the use of grievance procedures by an employee under a labor contract tolled the 90-day provision, even though they spoke of it as a "jurisdictional requirement." Holding further from the *Culpepper* case, the Court said, "The timing provisions will be subject to the same sort of equitable modifications that are applied to statute of limitations with the important additional requirement that these modifications will be applied in the interest

of effectuating the broad remedial purposes of the statute. Thus, even in circumstances where a modification might be denied application at the common law, the modification might still be applied if the Court felt that doing so would further the purposes of the statute considered as a whole."

The Court in *Reeb* went on to point out that in the *Culpepper* case it might be said that the plaintiff elected an alternative remedy and might have been denied the benefits of tolling at common law on that ground, but that the Court in *Culpepper* justified applying the equitable modification on the basis of the "great emphasis on Title VII on private settlement and the elimination of unfair practices without litigation."

The Court in *Reeb* further went on to hold that the ratio decidendi of the leading cases dealing with time requirements, in general, under the Act (Title VII) compelled the conclusion that the 90-day requirement was not jurisdictional in the sense that compliance with it vel non determines the jurisdiction of the District Court without respect to any of the other circumstances in a particular case. They held to the view that the requirement should be analogized to statutes of limitations, and that equitable modification such as tolling and estoppel are to be applied to them.

Cited also in the *Reeb* case were *Love v. Pullman Co.*, 404 U.S. 522, 92 S. Ct. 616 and 30 L. Ed. 2d 679 (1972), which

held that a notice filed with the EEOC without first filing with the state agency could be held in abeyance and considered after the state court had declined to take action thus indicating a liberal construction of the statute and thus establishing the time limitations for filing a complaint to be directory rather than mandatory. The *Reeb* Court went on to point out that remedial legislation such as Title VII of the Civil Rights Act of 1964 is entitled to the benefit of liberal construction.

In *Ott v. Midland-Ross Corp.*, 523 F.2d 1364 (6th Cir. 1975), the Court took note of 29 U.S.C. §626(b) and (c) where the Act specifically confers jurisdiction on the Court "to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this Chapter." The Court in this case granted equitable relief on the basis that the respondent had practiced fraud on the plaintiff in inducing him to give up certain rights under the Act.

The case of *Hiscott v. General Electric Co.*, 521 F.2d 632, (6th Cir. 1975), tactitly recognized that equity might be applied where appropriate but called attention to the fact that the Labor Department had by its letter, informed the claimant that the fact that he had submitted information concerning an alleged unlawful practice to their agency was not considered notice of intent to sue. Furthermore, the Court found that as no notice of an intent to sue was ever

given before suit was filed, it was immaterial to determine when the 180-day period within which it was to be given should begin to run.

So too in *Eklund v. Lubrizol Corp.*, 529 F.2d 247 (6th Cir. 1976), the Court after considering the case concluded as follows:

> "For the reasons enumerated, we do not believe that the facts of this case warrant equitable relief for appellant."

The Court in *Eklund* thus recognized that equitable relief could be proper in certain circumstances. One of the three Circuit Judges dissented, pointing out that in his view, *Hiscott v. General Electric Co.*, 521 F.2d 632 (6th Cir. 1975) (cited by the majority), did not hold the requirements of Section 626(d) to be jurisdictional in the sense that noncompliance with them would deprive a Court of its power to entertain a suit. The dissent further pointed out that although compliance with these notice requirements is a statutory prerequisite to bringing suit, an exceptional case meriting equitable relief is presented where a claimant can show proper circumstances. The dissent went on to state, "The Act should not be construed to make it a trap for the unwary, nor should it require every claimant to retain counsel experienced in the technicalities of age discrimination litigation."

In *Moses v. Falstaff Brewing Corp.*, 525 F.2d 92 (8th Cir. 1975), there was a fact question involved as to just when the

employee was discharged. The claimant therein was notified on November 12, 1973, that she no longer had a job but was not administratively terminated until November 30, 1973, having not worked after November 16, 1973.

In making the determination of when her discharge occurred and in applying equitable principles so as to bring her within the statute, the Court stated:

> "The Age Discrimination Act is remedial and humanitarian legislation. It is to be construed liberally to achieve its purpose of protecting older employees from discrimination.[7] A procedural requirement of the Act of doubtful meaning in the given case should not be interpreted to deny an employee a claim for relief unless to do so would clearly further some substantial goal of the Act." Id./914-915

The Court went on to point out that the interpretation urged by respondent would not "further some substantial goal of the Age Discrimination Act" and held that the 180-day notice requirement was intended to serve the purposes of the Act by insuring that the Secretary of Labor is called in for conciliation purposes.

The Third Circuit in *Goger v. H. K. Porter Company, Inc.*, 492 F.2d 13 (3rd Cir. 1974), applied equitable principles to excuse the claimant's failure to file her complaint with the state agency before filing with the Labor Department,

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[7] *Woodward v. Kinney Shoe Corp.*, 369 F.Supp. 911 (N.D. Ga. 1973)

since there were no cases construing the Act to that point and in view of the remedial purposes of the ADEA.

And in another ADEA case, *Skoglund v. Singer Co.*, (U. S. D. C., N.H. 1975) the Court held that claimant's failure to file a Notice of Intent to Sue within 180 days was not jurisdictional and could be excused on equitable principles. In so doing, the Court stated:

> "Remedial legislation should not be so narrowly read as to preclude achievement of its purpose; form should not be raised over substance.
>
> "Limitations which would take away a right from one for whom the statute was enacted have been required to be express and not subject to varying interpretations."[8]

The Court went on to hold that in a statutory scheme in which lay persons are expected to enforce their statutory rights, technicalities are not appropriate. The Court then cited *Love v. Pullman*, 404 U.S. 522, 527 92 S.Ct. 616, 619, 30 L.Ed. 2d 679 (1972), where the Court in considering the procedural technicalities of Title VII stated:

> "Such technicalities are particularly inappropriate in a statutory scheme in which laymen, unassisted by trained lawyers, initiate the process."

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[8] *Woodford v. Kinney Shoe Corp.*, 369 F.Supp. 911, 914 (N.D. Ga. 1973) Cf. *Evans v. Sheraton Park Hotel*, 164 U.S.App.D.C. 86, 503 F.2d 177 (1974); *EEOC v. Wah Chang Albany Corp.*, 499 F.2d 187 (9th Cir. 1974); *Sanchez v. Standard Brands, Inc.* 431 F.2d 455 (5th Cir. 1970)

The Court further pointed out that there was no indication from the words of Section 626(d) that the 180-day notification requirement was "jurisdictional" in the sense that compliance with it or lack thereof determines, without regard to other circumstances, the jurisdiction of a Federal Court. In closing, in the *Skoglund* case, the Court stated:

> "As noted above, ADEA is remedial legislation. It is therefore entitled to a broad reading. It creates rights in a class of employees, the elderly employed, and it places a burden on employers to inform that class of their rights."

Lately in *Rucker v. Great Scott Supermarkets*, 528 F.2d 393 (6th Cir. 1976), the claimant gave the Secretary of Labor only two-days notice of intent to file suit. Here, again, the Court held that the Notice of Intent to File Suit is a jurisdictional prerequisite but even there observed that such action could not be held to be compliance "absent of showing of special facts warranting granting of equitable relief." While it is true in this case that the Court did hold that the 60 day Notice of Intent to Sue is jurisdictional, it did not hold that the failure to file it withn 180 days would require dismissal of the claimant's suit and recognizes equitable principles could apply. Once again, in a dissenting opinion, Circuit Judge McCree stated his feeling that in the proper case "substantial compliance" with the statutory preconditions to suit would be sufficient.

A close reading of the cases cited above reveals that they considered equitable relief to be appropriate in each case and either denied it or granted it depending upon whether the claimant was entitled to such relief under the facts of the particular case. The Tenth Circuit gave as reasons for its opinion: (1) The similarities between Title VII and the ADEA and (2) the liberal reading of analogous time limitations in Title VII, (3) the overly broad usage of the term "jurisdictional" by Courts interpreting Section 626(d) of the ADEA, (4) the remedial nature of the legislation, (5) the lack of legal training and guidance for many of the ADEA complainants. This constituted a very sound basis considering the nature, history and purpose of the Act. The Secretary of Labor has stated in his brief Amicus Curiae that one-half of the cases filed under the ADEA have been dismissed on procedural grounds with one-third being dismissed because the 60-day Notice of Intent to Sue required to be filed within 180 days.

Thus, since the Circuit Courts are in accord in principle there remains no compelling reason to grant the writ sought by petitioner, Shell Oil Company. Writs of Certiorari should be sparingly granted.[9] It is not a matter of right but of sound judicial discretion.[10]

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[9] *Rice v. Sioux City Cemetery*, 349 U.S. 70, 99 L.Ed. 897, 75 S.Ct. 614

[10] Rule 19 S.Ct.

Certiorari is granted only in case involving principles, the settlement of which are of importance to the public as distinguished from the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the Courts of Appeals.[11]

CONCLUSION

The purposes of the 180-day notice requirement in giving the Secretary of Labor an opportunity to achieve conciliation and giving the employer notice of a possible suit have been amply fulfilled in the present case as was held by the Tenth Circuit. No prejudice has resulted to the defendant. The case fairly cries out for equity. The decision of the Tenth Circuit is not only correct but presents no real conflict with the other Circuit Courts which have decided the question or which would justify the granting of the writ sought. The writ should be denied.

Respectfully submitted,

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[11] *Rice v. Sioux City Cemetery*, 349 U.S. 70, 99 L.Ed. 897, 75 S.Ct. 614; *NLRB v. Pittsburgh S.S. Co.*, 340 U.S. 498, 95 L.Ed. 479, 71 S.Ct. 453.